SPECIAL BOARD OF ADJUSTMENT
AWARD NO. 2
(CASE NO. 3870-22)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 589, AFL-CIO

vs.

THE LONG ISLAND RAIL ROAD COMPANY

Michael Capone, Chair and Neutral Member
Kelli N. Coughlin, Carrier Member
Ricardo Sanchez, Employee Member

Hearing Date: January 24, 2023

STATEMENT OF CLAIM

"The Carrier not only violated the Grievant's constitutional rights, which will be addressed in the proper Federal Forum, but also violated the CBA mutually negotiated between the parties.

The Carrier has also violated provisions of the recently enacted New York State Marijuana Regulation and Taxation Act, by disciplining the Grievant for a legally protected activity outside of the workplace to be addressed in the proper Federal Forum.

The Carrier has blatantly violated basic contract principles intentionally relying on a unilaterally imposed policy to negate and supersede clear contract language.

The Carrier has ignored the commonsense objective of the Drug and Alcohol policy, and its actions have not done anything to enhance safety."

BACKGROUND

This Board derives its authority from the provisions of the Railway Labor Act, as amended, together with the terms and conditions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") by and between the International Brotherhood of Electrical Workers, Local Union 589 (hereinafter referred to as the "Organization") and the Long Island Rail Road Company (hereinafter referred to as the "Carrier"). After hearing upon the whole and all evidence as developed on the property, the Board finds that

the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the hearing thereon. The Claimant was ably represented by the Organization.

The Claimant, Daren Drew, is an Electrician employed by the Carrier for approximately 24 years. On June 7, 2022, the Claimant submitted to a return-to duty physical examination which included a drug and alcohol test following an absence of more than 30 days. He resumed his job as an Electrician on June 8. On June 14, 2022, the Claimant was notified of a hearing and investigation to be held on June 23, 2022, after testing positive for marijuana as a result of the return-to-duty drug test. After numerous postponements hearings were held on November 16, 2022, February 7, March 8, and April 27, 2023. On May 18, 2023, the Claimant was notified that he was dismissed from service after the Carrier found him guilty of violating the Corporate Absence and Substance Abuse Policy (hereinafter referred to as the "Policy"). The record indicates that the Carrier denied subsequent appeals by the Organization and rendered its final decision on August 3, 2023. The Organization rejected the Carrier's decision and moved to have the matter adjudicated before this Board.

OPINION OF THE BOARD

In discipline cases, as the one before the Board here, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, that the penalty imposed is not an abuse of discretion. Upon review of all evidence adduced during the on-property investigation, the Board finds that the Carrier has met its burden of proof that the Claimant violated the Carrier's Policy. However, we find the discipline imposed is excessive.

The documentary evidence and testimony of Senior Manager, Manpower Resource Management Corinne Swicicki, Assistance Medical Director and Medical Review Officer ("MRO") Dr. Mohammad Mujtaba, and Assistant Director, Employee Services Christopher Yodice provide substantial evidence that the Claimant violated the Carrier's Policy. Substantial evidence is defined as more than a mere scintilla, and "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, (1938). The substantial evidence standard has been applied consistently in the industry by legions of arbitral authority. It requires the moving party to provide relevant material evidence by which a reasonable mind can find support for the conclusion asserted. In the instant case, substantial, probative evidence brought forth in the investigation by the Carrier established that the Claimant tested positive for marijuana in violation of its Policy.

The record establishes that the laboratory confirmed the positive test results from the Claimant's urine specimen to the Carrier on June 13, 2022. Upon being informed by the MRO of the confirmatory test result and, as provided for in the Code of Federal Regulations ("CFR"), the Claimant elected to have his split urine specimen tested. On June 22, 2022, the MRO documented that the split specimen test re-confirmed the original test result as positive for marijuana.

There is no basis to ignore the Carrier's assessment of the evidence and testimony. Nothing in the record adequately supports the Organization's assertions that the drug test results were due to a "false positive". Nor is there any evidence that the Carrier or laboratory violated any federal regulations. Despite the Claimant's testimony that he did not ingest or use marijuana, the documentary evidence and testimony provided by the Carrier sufficiently supports its conclusion that he violated its Policy. It is well established

by arbitral precedent that the Board sits in appellate review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations of the witnesses' testimony with our own.

The Organization incorrectly concludes that the Carrier violated the Agreement when it removed the Claimant from service. Its claim that the Carrier failed to provide a fair and impartial hearing is not supported by the record. In addition, there is no reliable evidence that the Carrier did not adhere to the drug testing and reporting procedures in accordance with federal regulations.

The Organization's assertion that the hearing officer failed to provide a fair and impartial hearing was not addressed during the on-property handling of the dispute and therefore is not reviewable by the Board. Similarly, the same finding applies to the Organization's contention that the MRO erred when he verified the drug test results two days before he verified whether the Claimant's medications could have produced a false positive. The Board notes that even if the alleged flaw was raised during the on-property handling of the dispute, our review of the record confirms that the MRO did not act improperly or contrary to federal regulations.

The Board rejects the Organization's allegation that the return-to-duty drug test was improperly conducted because the Claimant is not designated a safety-sensitive employee by federal regulations. The issue of an electrician's safety-sensitive designation and requirement to undergo a physical examination that includes a drug and alcohol test upon returning to work following an absence of 30 days or more has been previously decided by this Board in its decision, *In re Return-to-Duty Drug Test*, dated July 5, 2022. We find no basis in the record here to alter our previous findings.

The Board here confirms that where not limited by the Agreement the Carrier has the discretion to implement policies that ensure the safety of its employees and the public. The Carrier's Policy, in effect for decades, expressly states that "All employees are prohibited from: 1. Using alcoholic beverages, intoxicants or controlled substances, or being under the influence or impaired by same, while subject to duty or while on duty."

The record does not support the Organization's claim that the Carrier violated Rule 53 when it removed the Claimant from service on June 13, 2022, before conducting "a fair and impartial trial". Rule 53, Discipline, in pertinent part, reads as follows:

> (a) Employees will not be suspended nor dismissed from service without a fair and impartial trial.
>
> (b) When a major offense has been committed, an employee suspected by the management to be guilty thereof may be held out of service pending such trial and decision only if their retention in service could be detrimental to themselves, another person, or the Carrier.
>
> The following types of offenses justify pre-investigation suspension when there is sufficient reason to believe the employee is guilty of the offense and that he/she might commit the offense again if not withheld from service: (1) theft; (2) unsafe practices; (3) serious insubordination; (4) threatening or abusive conduct; (5) fighting on duty or on Carrier property; (6) under the influence of alcohol or narcotics while on duty; (7) rape, assault or other serious criminal activities.

It is "beyond the pale" that a positive drug test in the industry is a "major offense". The Organization relies, in part, on Senior Manager, Manpower Resource Management Corinne Swicicki's testimony that none of the seven criteria in Rule 53(b) apply to the Claimant. However, Ms. Swicicki also testified that she believed the "pre-investigation suspension" was appropriate under Rule 53(b) wherein an employee may be held out of service if they could be "detrimental to themselves, another person, or the Carrier." Moreover, the on-property record confirms that on August 18, 2022, the Carrier's Chief Mechanical Officer responded to the Organization's claim "EL-02-22" regarding the Claimant, confirming that he was removed from service in accordance with Rule 53(b) for

committing an "unsafe practice". We find the Carrier did not violate Rule 53 when it determined that a "pre-investigation suspension" was appropriate where it considered the Claimant's positive drug test result as "detrimental" and an "unsafe practice" by a safety-sensitive electrician.

The Board finds that the Organization errs in its conclusion that the Carrier did not comply with 49 CFR § 40.329(a) when it failed to provide the Claimant with the laboratory's documentation – also referred to as the "Litigation Package". The regulation provides that such records must be provided by the MRO and the laboratory "within 10 business days of receiving a written request from an employee". (See 49 CFR § 40.329[a] and [b]) No such written request was made by the Claimant. Nor do we find any such requirement for the MRO to provide laboratory documentation in 49 CFR § 40.123. Moreover, the record indicates that the inquiry made by the Claimant during the investigation was about documentation related to the split sample result. The MRO explained how the documentation was from two laboratories – Quest Diagnostics (performed the initial screen and confirmatory tests) and Labcorp (performed the split sample test).

We also find no basis to support the Organization's claim that the drug test results were inconclusive. The record does not contain any evidence that the laboratory test results did not conform to federal regulations. The MRO explained that he was not required to obtain the initial test (immunoassay) nanogram ("ng") result. He correctly testified that the laboratory was only required to provide him with the confirmatory test (gas chromatography/mass spectrometry [GC/MS]) result. (See 49 CFR § 40.85) The confirmatory test cutoff concentration for marijuana is 15 ng/mL. The Claimant's confirmatory positive test result was 31 ng/mL. As such, we reject the Organization's

assertion that no competent testing was performed and that the chain of custody documentation or test results were deficient.

The evidence does not support the Organization's allegation that the MRO did not contact the Claimant's physician to discuss whether any of his reported medications may have resulted in a "false positive". Dr. Mujtaba testified that he did contact the physician after having the initial interview with the Claimant when he reported the positive test result to him. The Claimant subsequently provided the MRO with additional documentation from two physicians claiming that he was taking ibuprofen which "potentially" or "possibly cause a false positive". Dr. Mujtaba testified that ibuprofen would not result in a positive drug test result and there was no basis for him to contact the physicians.

Nothing in the record indicates that the MRO was required to contact the Claimant's physician where the use of non-prescribed substances is reported. (See 49 CFR § 40.129 and 40.137) Moreover, 49 CFR § 40.141 addresses prescribed medications and states, in pertinent part, that the MRO may contact the employee's physician for "further information". We find no basis in the record to recognize the Organization's reliance on the document referred to in the record as "MRO Requirements". It purportedly was introduced to establish that the MRO was required to contact the Claimant's physicians. However, the Organization does not properly establish its origin and reliability as a regulatory authority on the MRO's function and responsibilities.

Having determined that the Carrier has met its burden of proof we move to our assessment of the penalty imposed. The Carrier asserts that dismissal is warranted since the Claimant rejected a "trial waiver agreement" wherein he would have been assessed a suspension and reinstated. It avers that its decision to dismiss the Claimant is consistent with its Policy and how it has been applied to other employees. The Carrier claims the

dismissal is appropriate since the Claimant has denied drug use in the face of substantial evidence and therefore, has not been willing to acknowledge culpability.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Our review of the penalty assessed finds it to be arbitrary. Where not limited by the Agreement, the Board has discretion to fashion a remedy where its finds the discipline imposed excessive. Such a determination is premised on a review of whether there are sufficient grounds for discipline short of dismissal, where it can provide an opportunity for rehabilitation and a deterrent to future misconduct, in addition to considering the employee's years of service.

Here, the Claimant has been employed for over 24 years with no evidence of prior discipline. The record indicates that the Claimant is considered a good employee. These factors must be given significant weight where the nature of the charges, and the Carrier's Policy, provide a basis for corrective measures. In addition, the Policy states that disciplinary action for violations can be "up to and including dismissal".

The Carrier relies on arbitral precedent to support its conclusion that dismissal is the proper penalty. The Board finds the awards cited by the Carrier to be distinguishable from the circumstances presented here. In each of the cases cited the employees either had poor disciplinary records and/or were found to be under the influence of a drug while on duty following a reasonable suspicion test, which indicates some sort of on-duty conduct that resulted in a drug test. Moreover, compared to the Claimant, none of those employees had near as many years of service.

The Board finds that the Claimant's failure to acknowledge his culpability limits our ability to determine a penalty less than time served without pay. As such, the Claimant is reinstated to service, subject to the conditions set forth below, with seniority unimpaired

and without compensation for lost wages. Within 10 days of this Award and before reinstatement, the Claimant shall be evaluated by the Carrier's Employee Assistance Professional ("EAP"), as defined by its Policy, for a determination of his fitness for duty. The Claimant must complete any requirements set forth by the EAP before returning to service. The Claimant is warned that future violations of the Carrier's Policy shall be grounds for severe discipline up to and including dismissal.

In summary, we have reviewed and carefully weighed all arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has provided substantial evidence of the Claimant's violation of the Carrier's Policy but that the discipline imposed was excessive.

AWARD

Claim sustained in part, denied in part.

Date: February 26, 2024

Michael Capone, Chair and Neutral Member

Kelli N. Coughlin, Carrier Member

Ricardo Sanchez, Organization Member